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Committee: Judicial Proceedings
Testimony on: SB0187 - Criminal Procedure – Forensic Genetic Genealogical DNA Analysis, Searching, Regulation, and Oversight
Submitting: James V. Bartlett, Jr., PE
Position: Favorable
Hearing Date: February 4, 2021

Dear Mr. Chairman and Committee Members:

Thank you for allowing my testimony today in support of SB0187. I have been a genealogist since 1974, and a genetic genealogist since 2002. I have given presentations on genetic genealogy to local and international organizations for 17 years. I authored Chapter 1 (Lessons Learned from Triangulating a Genome) in the book: "Advanced Genetic Genealogy: Techniques and Case Studies", Editor Debbie Parker Wayne 2019; and I have an autosomal DNA blog: www.segmentology.org. The genetic genealogy community relies on our ability to get tested through Direct-to-Consumer testing companies and to compare our results within those companies as well as through 3rd party companies. Many of us have benefited from the shared DNA data. This includes "regular" genealogists as well as individuals seeking to identify their biological parent(s) and others who are mainly interested in their genetic admixture (aka ethnicity, population groups or heritage).

The Need for Informed Consent

The case of the "Golden State Killer" being identified with the help of genetic genealogy and a public database caused quite a stir among genetic genealogists. As more and more cases are "solved" using genetic genealogy tools, our concerns have centered around informed consent. This bill strongly addresses that concern.

Creating a Safe Environment for Genetic Genealogy

In general, genetic genealogists recognize the value of forensic genetics to Law Enforcement, and the techniques we have developed to identify familial relationships based on shared DNA. However, our concern is that this might be misused. Limiting Law Enforcement's use of forensic genetics to the most serious crimes, and only after all other avenues of investigation have been followed, is welcomed. Many genetic genealogists, myself included, have opted into Law Enforcement use (for selected serious crimes) at the popular GEDmatch site. We want to continue to voluntarily compare our DNA with others who have consented to sharing; and at the same time feel comfortable that use by Law Enforcement is regulated to very serious crimes. This bill provides that regulation.

Use in Rape Cases

It is hoped that Forensic Genetics can also be used to reduce the backlog of rape kits.

Respectfully submitted,
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TESTIMONY OF BARRY C. SCHECK, INNOCENCE PROJECT
SUPPORT FOR SENATE BILL 187
MARYLAND SENATE JUDICIAL PROCEEDINGS COMMITTEE
FEBRUARY 4, 2021

The Innocence Project is a nonprofit organization that exonerates the wrongfully convicted and works to reform the criminal justice system to prevent future injustice[1] and we commend the Committee for its proactive discussion of a first of its kind bill to regulate Forensic Genetic Genealogical DNA Analysis and Search (FGGS)[2] to ensure that its use is scientifically sound and just. We respectfully submit the following testimony to urge the Committee to affirm its support of the bill introduced by Senator Sydnor in collaboration with Delegate Shetty (HB240).

Issue in Current Policy:

Presently, the use of extraordinarily informative DNA technology to conduct genetic genealogy searches in criminal investigations in the United States is taking place without any significant scientific, legislative, professional, or judicial oversight. Some claim that as long as powerful new technologies are used "for investigative purposes only" and not introduced as evidence in court there is no need to be concerned about their impact on civil liberties, privacy, or the administration of justice. However, the Innocence Project believes the concern about the ethical and just application of forensic evidence should extend to investigative tools for two primary reasons. First, without proper safeguards, innocent people can inadvertently become the focus of investigations and wrongful convictions can occur when tunnel vision sets in. Second, absent regulation, powerful tools like genetic genealogy have the capacity to exonerate the innocent, but their application can negatively impact privacy interests and civil liberties.

[1] To date, the work of the Innocence Project, along with other innocence organizations and lawyers around the country, has led to the exoneration of hundreds of individuals based on new evidence of actual innocence, including DNA and other scientific evidence. These injustices demonstrated that the misapplication of forensic science is a leading cause of wrongful conviction, having played a role in the cases of 43 percent of the 375 wrongfully convicted people in the United States who have been exonerated by DNA testing, and nearly a quarter of the over 2,700 people who were exonerated by DNA or by other means.

[2] FGGS typically employs sequencing of vast regions of a person's genome, searching those results against a direct-to-consumer genomic database, followed by an investigation using genealogical methods as well as public records and other lawful means of obtaining information.

Issue in Practice:

Already, news reports have publicized how law enforcement officers have obtained DNA samples for genetic genealogical use through deception.[3] Stories like this not only rupture a community's trust in police but also negatively impact a community's willingness to partner with law enforcement to assist in solving even the most serious crimes. Dr. Thomas Callaghan, the Chief Biometric Scientist at the Federal Bureau of Investigation Laboratory, stated, "Absent best practices, use of FGG could lead to compromised cases, diminished use, or the loss of this new investigative tool. Public support for FGG could be jeopardized and confidence in forensic DNA analysis could be undermined."[4] However, to date we've also seen how FGGS has been instrumental in exonerating two innocent people who have suffered decades of unjust incarceration and identified for victims and their families the individuals who have now been charged with homicides.[5] We seek a legislative solution that can both honor the needs of public safety as well as strengthen public trust in police investigations.

Legislative Redress:

SB187 is based on the interim FGGS policy established by the U.S. Department of Justice (DOJ) in September 2019[6] which also recognized the need to provide special oversight for the use of FGGS. However, SB187 surpasses the DOJ's policy by establishing the following protections:

- **Judicial Oversight.** Due to the incredibly personal nature of a person's genomic data, SB187 ensures that FGGS is used only as a last resort in the most serious crimes. In order to pursue FGG testing, the government must obtain judicial authorization that certifies the FGG search request meets criteria established for the type of crime, the quality and probative nature of the DNA sample, and requires that all other investigative efforts be exhausted. Judicial oversight also applies when investigators seek the covert collection of DNA from the people who the FGGS has identified may have committed the crime. This requirement acknowledges the personal nature a person's DNA information and limits its use to only well-established cases and using the least invasive method.

- **Third Party Informed Consent and Data Expungement.** FGGS requires a time intensive investigative process. When genetic genealogists need a DNA sample from a relative of a potential person of interest in order to continue building the family tree, it is

[3] Jon Schuppe, *Police told a mother her DNA would identify a dead relative. They arrested her son instead.*, NBC NEWS, February 22, 2020, https://www.nbcnews.com/news/us-news/they-lied-us-mom-says-police-deceived-her-get-her-n1140696 (last visited Feb 29, 2020).

[4] Thomas F Callaghan, *Responsible genetic genealogy*, 366 SCIENCE 2 (2019).

[5] Mia Armstrong, *In an Apparent First, Genetic Genealogy Aids a Wrongful Conviction Case*, THE MARSHALL PROJECT, July 16, 2019, https://www.themarshallproject.org/2019/07/16/in-an-apparent-first-genetic-genealogy-aids-a-wrongful-conviction-case (last visited Mar 1, 2020); Don Thompson, *California man Ricky Davis exonerated with DNA, genealogy websites*, February 14, 2020, https://www.usatoday.com/story/news/nation/2020/02/14/california-man-ricky-davis-exonerated-dna-genealogy-websites/4759035002/ (last visited Mar 1, 2020).

[6] U.S. Department of Justice, *United States Department of Justice Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching* (2019), https://www.justice.gov/olp/page/file/1204386/download.

critical that these private citizens, who are innocent of the crime at hand, are treated with the dignity and respect. For this reason, SB187 has strong protections that require voluntary informed consent from the person who offers their genomic information to assist investigators and a rigorous process to document that the sharing of DNA was consensual. Investigators may only use direct-to-consumer or publicly available personal genomics databases that explicitly disclose their law enforcement partnerships and the information generated from these genetic genealogy investigations may be used only for the case at hand and destroyed upon the completion of the criminal prosecution.

- **Defense Access.** The accessibility of an investigative tool to both prosecution and defense is a marker of equitable and transparent use. SB187 makes it possible for innocent people to prove their innocence. A recent analysis by *The Atlantic* found that among the 104 murder cases solved by law enforcement use of FGGS, 79 were white and four were Black.[7] Defense access to FGGS can support racial equity in the distribution of its use.

Lastly, SB187 acknowledges the need for transparent data collection and reporting of the use of FGGS by calling for the Maryland Department of Public Safety and Correctional Services to produce a publicly accessible annual report that is reviewed by a panel of stakeholders who are representative of those who will use and be affected by FGGS, those who can ensure its continual application as a scientifically sound and just investigative tool, and the community of people whose lives will be impacted by the use of this tool.

In conclusion, we are deeply appreciative that Senator Sydnor and Delegate Shetty have proposed the regulation of FGGS in Maryland and that the Judicial Proceedings Committee is contemplating this issue in today's hearing. With your careful consideration, Maryland can establish a national model that demonstrates that a state can simultaneously enhance public safety, honor victims of crime, recognize the dignity of its people, proactively prevent the risk of wrongful convictions, and ensure that genetic technologies are implemented in a manner that provides not justice for some, but justice for all.

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[7] Jacob Stern Zhang Sarah, *The Victims Left Behind by Genetic Genealogy*, THE ATLANTIC (2021), https://www.theatlantic.com/science/archive/2021/01/genetic-genealogy-race/616171/ (last visited Feb 1, 2021).

SB 187 Sydnor Favorable Testimony with DOJ Docs.pd
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Testimony Regarding SB 187 – Criminal Procedure-Forensic Genetic Genealogical DNA Analysis, Searching, Regulation, and Oversight
Before the Senate Judicial Proceedings Committee
On February 4, 2021

Good afternoon Mr. Chairman, members of the Judicial Proceedings Committee.

The Maryland DNA Collection Act was originally enacted in 1994, authorizing the collection of DNA in order to "assist an official investigation of a crime; to identify human remains; to identify missing persons;" as well for other purposes. In 2008, Chapter 337 amended the Act to allow the State to collect DNA from people arrested for burglary, or violent crimes, at the time of their arrest. Chapter 337 also included a provision, Section 2-506(D), which "prohibited [a person] from performing a search of the statewide database for the purpose of the identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired."

Maryland maintains a statewide database containing DNA collected from individuals that have been convicted of certain crimes. These crimes include felonies, fourth-degree burglary, breaking and entering a vehicle, "crimes of violence", felony burglary, or an attempt to commit a crime of violence or felony burglary.[1] The term "crime of violence" includes several specific crimes, including abduction, arson, kidnapping, manslaughter, murder, rape, carjacking, first- or second-degree sexual offense, and various types of assault.[2] Maryland is one of the few, if not only state with legislation on familial DNA searching and the first to ban the practice statewide. According to a 2017 report, this ban was obtained because stakeholders cited particular concerns with FDS (familial DNA searches) related to racial justice and 4th Amendment privacy rights and lawmakers agreed.[3]

As governments and commercial enterprises develop and create their own databases, Maryland's efforts to balance privacy and public safety have fallen behind. However, with the passage of SB 187 this will no longer be the case.

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[1] See HB 30 (2019) Fiscal and Policy Note.
[2] *Id.*
[3] Study of Familial DNA Searching Policies and Practices: Case Study Brief Series. Department of Justice's Office of Justice Programs.

Direct-to-consumer genealogy services allow anyone to submit a sample of their DNA to learn a variety of things about their genetic makeup and ancestry. These services match the DNA of the individual against publicly available DNA profiles.[4] Recently, due to the cutting-edge combination of DNA and genetic genealogy, some public genealogy databases have also been used to help solve criminal cases. Detectives have searched with relative ease for distant relatives of an unknown suspect by analyzing the DNA submitted voluntarily to these databases.[5] This allows police to create a much larger family tree than would otherwise be possible using only law enforcement databases.

Perhaps the most well-known example of police solving a crime using DNA information from a direct-to-consumer genealogy database is the Golden State Killer case. Investigators entered DNA which the killer left at crime scenes into the GEDmatch genealogy database.[6] Based on the pool of people on the genealogy website, investigators were able to build a family tree of the unknown killer's relatives who had voluntarily submitted their DNA to the database.[7] Investigators narrowed the search based on age, location, and other characteristics, leading them to a suspect who did not submit his DNA to the genealogy service.[8]

Under current law, there are a variety of people who are subject to having their DNA put into the FBI's CODIS (Combined DNA Index System) database; these are persons convicted whose expectation of privacy was diminished when they were convicted. They include millions of felons, misdemeanants and in some cases, arrestees. Legislation I introduced in the past was focused on a different class of persons; persons that no reasonable person would believe has a diminished expectation of privacy. I spoke about the person who knowingly and voluntarily delivered their DNA, as well as their relatives', to a third party. This included persons who may for whatever reason submit their DNA willingly to another recreationally, maybe it is to Ancestry.com, 23 and me, or GEDMatch. I desired to ensure these people's rights were protected and respected.

When I first began my work in this area I noted a quote from Justice Scalia. He wrote "Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail."[9] SB 187 seeks to put in place a legal framework that balances privacy with the need to identify those who commit the most violent felonious crimes. SB 187 framework was built upon a foundation created by the U.S. Department of Justice (DOJ) 2019 interim policy.[10] However, SB 187 also includes guidance to when this technique may be

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[4] *Id.*
[5] *Id*
[6] Thomas Fuller, *How a Genealogy Site Led to the Front Door of the Golden State Killer Suspect*, New York Times, retrieved from https://www.nytimes.com/2018/04/26/us/golden-state-killer.html.
[7] *Id.*
[8] *Id.*
[9] Maryland v. King, 133 S. Ct. 1958 (Scalia, J., dissenting)
[10] U.S. Department of Justice, *United States Department of Justice Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching* (2019), https://www.justice.gov/olp/page/file/1204386/download.

used, judicial oversight in some key areas, and protections for those third parties who are not suspected of crimes as well as a licensing regime for those involved in this technique.

SB 187, is in all sense of the word a compromise bill, and I am okay with that. After last session, we created a workgroup.[11] This workgroup met bi-weekly over the course of two months to talk about this topic and a bill. We had the world's leading genetic genealogist CeCe Moore speak with us and provide insight into how she uses this technique. And we had long discussions and struggled over many of the provisions in this bill. However, from this work, SB 187 was born. With that, I would like to provide my panel with the opportunity to provide testimony about the functioning of this bill. I urge the committee to vote in favor of SB 187.

[11] We invited input from representatives of the Office of Public Defender, the Maryland States Attorney Association, the Maryland State Police, the Maryland Chiefs and Sheriffs, and the ACLU. We also invited Debra JH Mathews of the Johns Hopkins University Berman Institute of Bioethics, Law Professor Erin Murphy (New York University School of Law), Law Professor Natalie Ram (University of Maryland School of Law), Law Professor and Bioethicist Sonia Suter (George Washington University School of Law), Assistant Professor of Medicine, Timothy D. O'Connor, PhD., Evolutionary Genetics (University of Maryland School of Medicine) and Innocence Project founder Attorney Barry Scheck.

UNITED STATES DEPARTMENT OF JUSTICE
INTERIM POLICY
FORENSIC GENETIC GENEALOGICAL DNA ANALYSIS AND SEARCHING

I. Purpose and Scope[1]

The purpose of this interim policy is to promote the reasoned exercise of investigative, scientific, and prosecutorial discretion in cases that involve forensic genetic genealogical DNA analysis and searching ('FGGS').[2] It provides guidance to Department agencies when formulating a thoughtful and collaborative approach to important interdisciplinary decisions in cases that utilize this investigative technique. Collaboration between investigators, laboratory personnel, and prosecutors is important because the decision to pursue FGGS may affect privacy interests, the consumption of forensic samples, and law enforcement's ability to solve violent crime.

The Department must use FGGS in a manner consistent with the requirements and protections of the Constitution and other legal authorities. Moreover, the Department must handle information and data derived from FGGS in accordance with applicable laws, regulations, policies, and procedures. When using new technologies like FGGS, the Department is committed to developing practices that protect reasonable interests in privacy, while allowing law enforcement to make effective use of FGGS to help identify violent criminals, exonerate innocent suspects, and ensure the fair and impartial administration of justice to all Americans.

The Department will continue to assess its investigative tools and techniques to ensure that its policies and practices properly reflect its law enforcement mission and its commitment to respect individual privacy and civil liberties. This interim policy establishes general principles for the use of FGGS by Department components during criminal investigations and in other circumstances that involve Department resources, interests, and equities.

The scope of this interim policy is limited to the requirements set forth herein. It does not control investigative, scientific, or prosecutorial activities or decisions not specifically addressed. The Department's individual law enforcement components may issue additional guidance that is consistent with the provisions of this interim policy.

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[1] This interim policy provides Department components with internal guidance. It is not intended to, does not, and may not be relied upon to create any substantive or procedural rights or benefits enforceable at law or in equity by any party against the United States or its departments, agencies, entities, officers, employees, agents, or any other person in any matter, civil or criminal. This interim policy does not impose any legal limitations on otherwise lawful investigative or prosecutorial activities or techniques utilized by the Department of Justice, or limit the prerogatives, choices, or decisions available to, or made by, the Department in its discretion.

[2] As used in this interim policy, the term 'forensic genetic genealogical DNA analysis and searching,' or 'FGGS,' means the forensic genetic genealogical DNA analysis of a forensic or reference sample of biological material by a vendor laboratory to develop an FGG profile and the subsequent search of that profile in a publicly-available open-data personal genomics database or a direct-to-consumer genetic genealogy service.

II. Application

This interim policy applies to: 1) all criminal investigations in which an investigative agency in the Department of Justice ('investigative agency')[3] has exclusive or concurrent jurisdiction of the crime under investigation and the agency has lawful custody, control, or authority to use a forensic sample for FGG/FGGS; or 2) any criminal investigation in which the Department provides funding to a federal, state, local, or tribal agency to conduct FGG/FGGS; or 3) any criminal investigation in which Department employees or contractors conduct genealogical research on leads generated through the use of FGGS; or 4) any federal agency or any unit of state, local, or tribal government that receives grant award funding from the Department that is used to conduct FGG/FGGS.[4]

III. Background

a. STR DNA Typing and CODIS

Forensic DNA typing has historically been used to compare 13-20 STR DNA markers[5] between a forensic sample[6] and one or more reference samples.[7] When a suspect's identity is unknown, a participating crime laboratory may upload a forensic profile[8] into the FBI's Combined DNA Index System (CODIS). CODIS is a law enforcement database that compares DNA profiles derived from forensic samples to those of known offenders.

CODIS was created by the DNA Identification Act of 1994, Pub. L. No. 103-322 (1994), codified at 34 U.S.C. § 12592. This legislation authorized the FBI to create and maintain a national database comprised of designated DNA indices that are routinely searched against one another. If a CODIS search results in a confirmed match between a forensic profile and a known offender, a law enforcement lead is generated and the name of the matching offender is released. If the search does not result in a confirmed match, no lead is generated.

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[3] As used in this interim policy, the term 'investigative agency' includes any federal, state, local, or tribal law enforcement agency that receives funding from the Department of Justice to conduct FGG/FGGS.

[4] The Department will implement this policy under its federal grant programs (as applicable) through the inclusion of a specific condition(s) in federal awards.

[5] STR DNA typing is a widely-used forensic DNA technology that examines 13-20 (or more) genetic locations on the non-sex chromosomes that contain 2 to 6 base-paired segments known as nucleotides, which tandemly repeat at each location. A 'marker' is a genetic locus, or location.

[6] A 'forensic sample' is biological material reasonably believed by investigators to have been deposited by a putative perpetrator and that was collected from a crime scene, a person, an item, or a location connected to the criminal event. For purposes of this interim policy, the term 'forensic sample' also includes the unidentified human remains of a suspected homicide victim.

[7] A 'reference sample' is biological material from a known source.

[8] As used in this interim policy, 'forensic profile' means an STR DNA typing result, and an STR and/or mitochondrial DNA typing result for unidentified human remains, derived from a forensic sample.

b. Forensic Genetic Genealogical DNA Analysis and Searching

Forensic genealogy is law enforcement's use of DNA analysis combined with traditional genealogy research to generate investigative leads for unsolved violent crimes. Forensic genetic genealogical DNA analysis ('FGG') differs from STR DNA typing in both the type of technology employed and the nature of the databases utilized.

FGG examines more than half a million single nucleotide polymorphisms[9] ('SNPs'), which replace the STR DNA markers analyzed in traditional forensic DNA typing. These SNPs span the entirety of the human genome. This allows scientists to identify shared blocks of DNA between a forensic sample and the sample donor's potential relatives. Recombination or reshuffling of the genome is expected as DNA from each generation is passed down, resulting in larger shared blocks of identical DNA between closer relatives and shorter blocks between more distant relatives. Due to predicted levels of recombination between generations, it is possible to analyze these blocks of genetic information and make inferences regarding potential familial relationships.

Department laboratories currently do not analyze SNPs during forensic DNA casework. Thus, in appropriate cases, it is necessary to outsource biological material to vendor laboratories that perform FGG.[10] After a forensic or reference sample is genotyped by a vendor laboratory, the resulting FGG profile[11] is entered into one or more publicly-available open-data personal genomics DNA databases or direct-to-consumer genetic genealogy services ('DTC service(s)')[12] (collectively referred to herein as 'GG service(s)'). The FGG profile is then compared by automation against the genetic profiles of individuals who have voluntarily submitted their biological samples or entered their genetic profiles into these GG services ('service users'). A computer algorithm is used to evaluate potential familial relationships between the (forensic or reference) sample donor and service users.

It is important to note that personal genetic information is not transferred, retrieved, downloaded, or retained by GG service users — including law enforcement — during the automated search and comparison process. In addition, the investigative use of FGGS involves different DNA technologies, genetic markers, algorithms, and databases from those used by

[9] 'Single nucleotide polymorphisms' are DNA sequence variations that occur when a single nucleotide (A, T, G, or C) in a genomic sequence is altered. These variations may be used to distinguish people for purposes of biological relationship testing.

[10] Contracts with vendor laboratories for FGG services should be reviewed by legal counsel to ensure that they contain appropriate language requiring maintenance of privacy and security controls for handling biological samples, FGG profiles, and other information and data both submitted to, and generated by, those vendor laboratories.

[11] The term 'FGG profile' means the SNP-based genetic profile generated from a forensic or reference sample by a vendor laboratory for the purpose of conducting FGGS.

[12] Direct-to-consumer genetic genealogy services are companies that offer a variety of DNA genomics tests and/or genetic genealogy services directly to the public (rather than through clinical health care providers), typically via customer access to secure online websites.

CODIS. Information and data derived from FGGS is not, and cannot be, uploaded, searched, or retained in any CODIS DNA Index.

IV. Limitations

If the search of an FGG profile results in one or more genetic associations,[13] the GG service typically generates and provides the service user with a list of genetically associated service usernames along with an estimated relationship and (in some cases) the amount of DNA shared by those individuals. A genetic association means that the donor of the (forensic or reference) sample may be related to a service user. However, information derived from genetic associations is used by law enforcement only as an investigative lead. Traditional genealogy research and other investigative work is needed to determine the true nature of any genetic association.

A suspect shall not be arrested based solely on a genetic association generated by a GG service. If a suspect is identified after a genetic association has occurred, STR DNA typing must be performed, and the suspect's STR DNA profile must be directly compared to the forensic profile previously uploaded to CODIS.[14] This comparison is necessary to confirm that the forensic sample could have originated from the suspect.

V. Case Criteria

Investigative agencies may initiate the process of considering the use of FGGS when a case involves an unsolved violent crime[15] and the candidate forensic sample[16] is from a putative perpetrator,[17] or when a case involves what is reasonably believed by investigators to be the unidentified remains of a suspected homicide victim ('unidentified human remains'). In addition, the prosecutor, as defined in footnote twenty of this interim policy, may authorize the investigative use of FGGS for violent crimes or attempts to commit violent crimes other than homicide or sexual offenses (while observing and complying with all requirements of this

[13] A 'genetic association' is determined by the amount of DNA shared between two individuals whose genetic profiles (including, in some cases, an FGG profile) have been entered into a GG service. This amount is measured and reported in centiMorgans. In general, the more DNA shared between two individuals, the higher the number of centiMorgans and the closer the genetic kinship relationship.

[14] Manual comparison is sufficient.

[15] As used in this interim policy, the term 'violent crime' means any homicide or sex crime, including a homicide investigation during which FGGS is used in an attempt to identify the remains of a suspected homicide victim. It also includes other serious crimes and criminal offenses designated by a GG service for which investigative use of its service by law enforcement has been authorized by that service.

[16] A 'candidate forensic sample' is: 1) the remaining portion of a forensic sample or extract being considered for FGGS, and from which a forensic profile was previously derived and uploaded to CODIS; or 2) one or more additional forensic samples or extracts from the same case that share the same forensic profile(s) as that derived from the forensic sample(s) uploaded to CODIS.

[17] A 'putative perpetrator' is one or more criminal actors reasonably believed by investigators to be the source of, or a contributor to, a forensic sample deposited during, or incident to, the commission of a crime.

interim policy) when the circumstances surrounding the criminal act(s) present a substantial and ongoing threat to public safety or national security. Before an investigative agency may attempt to use FGGS, the forensic profile derived from the candidate forensic sample must have been uploaded to CODIS, and subsequent CODIS searches must have failed to produce a probative and confirmed DNA match.

The investigative agency with jurisdiction of either the crime or the location where the unidentified human remains were discovered (if different) must have pursued reasonable investigative leads[18] to solve the case or to identify the unidentified human remains. Finally, when applicable, relevant case information must have been entered into the National Missing and Unidentified Persons System ('NamUs') and the Violent Criminal Apprehension Program ('ViCAP') national database.[19]

VI. Investigative Collaboration

If each of the criteria set forth in Section V has been satisfied, the investigative agency shall contact a designated official at the CODIS laboratory ('designated laboratory official' or 'DLO') that uploaded the forensic profile to CODIS. The DLO must determine if the candidate forensic sample is from a single source contributor or is a deduced mixture. The DLO will also assess the candidate forensic sample's suitability (e.g., quantity, quality, degradation, mixture status, etc.) for FGG and advise the investigative agency about the results of that evaluation. In addition, the DLO may advise the investigative agency of any reasonable scientific alternatives to FGGS, given the nature and condition of the candidate forensic sample, and the availability of other DNA technologies or techniques. The investigative agency shall document its consultation with the DLO.

After consulting with the DLO, the investigative agency shall contact the prosecutor.[20] The investigative agency shall advise the prosecutor of the nature and status of the investigation, the results of the DLO's evaluation of the candidate forensic sample, and any reasonable scientific alternatives to FGGS provided by the DLO.[21] After discussing these issues, and based on the information provided, the prosecutor and the investigative agency must agree that the

[18] 'Reasonable investigative leads' are credible, case-specific facts, information, or circumstances that would lead a reasonably cautious investigator to believe that their pursuit would have a fair probability of identifying a suspect.
[19] This latter requirement only applies if the case meets relevant ViCAP case entry criteria.
[20] As used in this interim policy, the term 'prosecutor' refers, as applicable, to the Assistant Attorney General, United States Attorney, state or local prosecuting attorney, or state attorney general (or his or her designee), with jurisdiction of either the crime under investigation or the location where the unidentified human remains were discovered (if different). When the Department of Justice and one or more state or local prosecuting authorities have concurrent jurisdiction of the crime(s) under investigation, the 'prosecutor' means the Assistant Attorney General, United States Attorney, or the state or local prosecuting official whose office will prosecute the case in the event that charges are filed.
[21] If circumstances permit, it is best practice to have the DLO join (telephonically or otherwise) this meeting. The DLO's participation can help ensure provision of the most complete and detailed information possible regarding sample status, testing options, and possible alternatives to FGGS. This information can, in turn, help optimize subsequent investigative decisions.

candidate forensic sample is suitable for FGG, and that FGGS is a necessary and appropriate step at that stage of the investigation to develop investigative leads or to identify the unidentified human remains. If agreement is reached on these points, FGGS may proceed.

VII. Investigative Caution

Investigative agencies shall identify themselves as law enforcement to GG services and enter and search FGG profiles only in those GG services that provide explicit notice to their service users and the public that law enforcement may use their service sites[22] to investigate crimes or to identify unidentified human remains. The investigative agency shall, if possible, configure service site user settings that control access to FGG profile data and associated account information in a manner that will prevent it from being viewed by other service users.

In certain cases, the genetic association of an FGG profile with a GG service user, in conjunction with subsequent genealogy research, may identify one or more third parties[23] who may have a closer kinship relationship to the donor of the forensic sample than the associated GG service user. In such cases, the acquisition of reference samples from these third parties for the purpose of conducting FGGS may help the investigative agency identify the donor of the forensic sample.

An investigative agency must seek informed consent from third parties before collecting reference samples that will be used for FGGS, unless it concludes that case-specific circumstances provide reasonable grounds to believe that this request would compromise the integrity of the investigation. If that determination is made, the investigative agency shall consult with, and receive approval from, the prosecutor[24] before covertly collecting any reference samples that will be used for FGGS. The investigative agency shall also consult with the DLO, who may provide guidance to investigators about the type and nature of biological samples that may prove most conducive to FGG analysis. Covert collection shall be conducted in a lawful manner. In addition, a search warrant shall be obtained by the investigative agency before a vendor laboratory conducts FGG analysis on any covertly-collected reference sample.

Investigative agencies shall use biological samples and FGG profiles only for law enforcement identification purposes and shall take all reasonable and necessary steps and precautions to ensure that same limited use by others who have authorized access to those samples and profiles. Biological samples and FGG profiles shall not be used by investigative

[22] The term 'service site' means the online web page and content of a GG service.
[23] As used in this interim policy, the term 'third party' means a person who is not a suspect in the investigation.
[24] Before authorization is granted, the prosecutor should notify and consult with the prosecutor in the jurisdiction where the sample will be covertly collected (if different) to ensure that all applicable legal authorities and local procedures relevant to sample acquisition are followed. When the Department of Justice and one or more state or local prosecuting authorities have concurrent jurisdiction of the crime(s) under investigation, the 'prosecutor' means the Assistant Attorney General, United States Attorney, or the state or local prosecuting official whose office will prosecute the case in the event that charges are filed.

agencies, vendor laboratories, GG services, or others to determine the sample donor's genetic predisposition for disease or any other medical condition or psychological trait.

FGGS is a law enforcement technique used to generate investigative leads. Investigative agencies shall not arrest a suspect based solely on a genetic association generated by a GG service. Traditional genealogy research and other investigative work is required to determine the true nature of any genetic association.

VIII. Sample and Data Control and Disposition

All FGG profiles and GG service account information and data shall be treated as confidential government information consistent with any applicable laws, regulations, policies, and procedures. These materials are subject to transfer and disclosure by Department employees and contractors only during the discharge of their official duties and only for authorized purposes.

If a suspect is arrested and charged with a criminal offense while FGG is in progress, the investigative agency shall promptly contact the relevant vendor laboratory or DTC service and direct that all testing cease at a point in time when the (forensic or reference) sample can be preserved. The investigative agency shall also request that the sample, extract,[25] and amplicon[26] be returned directly to the submitting law enforcement agency or custodial CODIS laboratory, as applicable. The investigative agency shall document its request and compliance by the vendor laboratory or DTC service.

If a suspect is arrested and charged with a criminal offense after an FGG profile has been entered into one or more DTC services, the investigative agency shall make a prompt formal request that all FGG profiles and associated account information and data held by any such service be removed from its records and provided directly to the investigative agency.[27] The investigative agency shall document its request and compliance by the DTC service(s). All FGG profiles, account information, and data shall be retained by the investigative agency for potential use during prosecution and subsequent judicial proceedings.

If a suspect is arrested and charged with a criminal offense after an FGG profile has been entered into an open-data personal genomics DNA database, the investigative agency shall promptly remove the FGG profile and all associated account information and data from the database.[28] The investigative agency shall document the removal of this information and data. It

[25] 'Extract' is the total amount of cellular DNA isolated from a biological sample.
[26] 'Amplicon' is the total amount of the targeted DNA segment or sequence generated by the PCR amplification process.
[27] These requests should be made only after the suspect's known STR DNA profile has been manually compared to the forensic profile previously uploaded to CODIS and it has been determined that the profiles match.
[28] The profile, information, and data should be removed only after the suspect's STR DNA profile has been manually compared to the forensic profile previously uploaded to CODIS and it has been determined that the profiles match.

shall be retained by the investigative agency for potential use during prosecution and subsequent judicial proceedings.

Subject to applicable law, in all cases that result in a criminal prosecution, reference samples obtained from third parties for FGGS (including all extracts and amplicon), all derivative FGG profiles, and all GG service account information and data shall be destroyed by the investigative agency only after the entry of an appropriate judicial order. The investigative agency shall document the authorized destruction of these samples, profiles, information, and data.

Subject to applicable government information retention schedules, if FGGS does not result in an arrest and the filing of criminal charges, the investigative agency shall promptly destroy all third-party reference samples (including all extracts and amplicon), all derivative FGG profiles, and all GG service account information and data after their investigative use is complete. The investigative agency shall document the destruction of these samples, profiles, information, and data.

IX. Collection of FGGS Metrics

Each Department component that either uses or funds another agency to use FGG/FGGS for criminal investigative purposes, or that provides any unit of federal, state, local, or tribal government with grant award funding that is used by a grantee to conduct FGG/FGGS for criminal investigative purposes, shall collect and retain the following information on an annual basis: 1) the type of crime investigated; 2) whether FGG/FGGS was conducted on a forensic sample or a reference sample; 3) the type of forensic sample subjected to FGG, and a description of the total amount, condition, and concentration of that sample (e.g., single source, mixed profile, degradation status, etc.); 4) whether FGG analysis resulted in a searchable profile; 5) the identity of the vendor laboratory used to conduct FGG and the GG service(s) used to search the FGG profile; 6) whether the investigation resulted in an arrest that was based, in part, on the use of FGGS; and 7) the total amount of federal funding used to conduct FGG/FGGS in each case.

POLICY FORUM

GENETICS AND PRIVACY

Genealogy databases and the future of criminal investigation

The police can access your online family-tree research—and use it to investigate your relatives

By **Natalie Ram,[1] Christi J. Guerrini,[2] Amy L. McGuire[2]**

The 24 April 2018 arrest of Joseph James DeAngelo as the alleged Golden State Killer, suspected of more than a dozen murders and 50 rapes in California, has raised serious societal questions related to personal privacy. The break in the case came when investigators compared DNA recovered from victims and crime scenes to other DNA profiles searchable in a free genealogical database called GEDmatch. This presents a different situation from the analysis of DNA of individuals arrested or convicted of certain crimes, which has been collected in the U.S. National DNA Index System (NDIS) for forensic purposes since 1989. The search of a nonforensic database for law enforcement purposes has caught public attention, with many wondering how common such searches are, whether they are legal, and what consumers can do to protect themselves and their families from prying police eyes. Investigators are already rushing to make similar searches of GEDmatch in other cases, making ethical and legal inquiry into such use urgent.

In the United States, every state, as well as the federal government, has enacted laws enumerating which convicted or arrested persons are subject to compulsory DNA sampling and inclusion in the NDIS database. The NDIS contains more than 12 million profiles, and it is regularly used to match DNA from crime scenes to identify potential suspects. It is only helpful, however, if the suspect—or a family member of the suspect—has been arrested or committed a crime and their DNA has been collected and stored.

The case of the Golden State Killer is not the first instance of investigators turning to nonforensic DNA databases to generate leads. This was not even the first time investigators used genealogical DNA matches to develop and pursue a suspect in the Golden State Killer case itself. A year before investigators zeroed in on DeAngelo, they subpoenaed another genetic testing company for the name and payment information of one of its users and obtained a warrant for the man's DNA. He was not a match. Similarly, in 2014, Michael Usry found himself the target of a police investigation stemming from a partial genetic match between his father's DNA, stored in an Ancestry.com database, and DNA left at a 1996 murder scene. On the basis of the partial match, police were able to obtain a court order requiring Ancestry.com to disclose the identity of the database DNA match. After mapping out several generations of Usry's father's family, investigators zeroed in on Usry, eventually securing a warrant for his DNA. Ultimately, Usry was cleared as a suspect when his DNA proved not to match the crime scene DNA.

But there have also been reported successes. In 2015, for example, Arizona police arrested and charged Bryan Patrick Miller in the Canal Killer murders based in part on a tip drawn from a genealogical database search (*1*). Searches like these, drawing on genetic information unrelated to the criminal justice system, may offer substantial benefits. Allowing police to conduct similar database searches in other cases is likely to lead to more solved crimes. Moreover, expanding law enforcement investigations to encompass genealogical databases may help to remedy the racial and ethnic disparities that plague traditional forensic searches. In accordance with state laws, official forensic databases are typically limited to individuals arrested or convicted of certain crimes. Racial and ethnic disparities throughout the criminal justice system are therefore reproduced in the racial and ethnic makeup of these forensic databases. Genealogical databases, by contrast, are biased toward different demographics. The 23andMe database, for instance, consists disproportionately of individuals of European descent. Including genealogical databases in forensic searches might thus begin to redress, in at least one respect, disparities in the criminal justice system.

There are few legal roadblocks to police use of genetic databases intended to help individuals explore their health or identify genetic relatives. The Fourth Amendment's protection against warrantless searches and seizures generally does not apply to material or data voluntarily shared with a third party, like a direct-to-consumer genetics testing or interpretation company or a genetic matching platform like GEDmatch. Once an individual has voluntarily shared her data with a third party, she typically cannot claim any expectation of privacy in those data—and so the government need not secure a warrant before searching it.

Beyond the Constitution, three federal laws protect some genetic data against certain disclosures, but these too are unlikely to provide an effective shield against law enforcement searches in nonforensic genetic databases. The Genetic Information Nondiscrimination Act (GINA) protects genetic data, but only against certain uses by employers and health insurers (*2*). GINA provides no protection against law enforcement searches. Similarly, most companies and websites offering DNA testing, interpretation, or matching services directly to individuals likely are not covered by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, which governs the use and disclosure of identifiable health information. These providers are usually careful to explain that they are not engaged in health care or the manipulation or provision of health data (*3*). Finally, although certificates of confidentiality protect scientific researchers from disclosing data to law enforcement—even against a warrant (*4*)—they do not extend to scenarios in which law enforcement is just another contributor to and user of online genetic resources, such as public databases and matching tools. Certificates of confidentiality have faced few challenges in court, and so it is also uncertain whether the protection they purport to provide will hold up against a challenge by law enforcement seeking access.

Consistent with this legal landscape, companies and websites that generate, interpret, or match genetic data directly for individuals often do not promise complete protection. In terms of law enforcement, for instance, 23andMe states in its privacy policy, "23andMe will preserve and disclose any and all information to law enforcement agencies or others if required to do so by law or in the good faith belief that such preservation or disclosure is reasonably necessary to…comply with legal or regulatory process (such as a judicial proceeding, court order, or government inquiry)…" (*5*). Ancestry.com similarly

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discloses, "We may share your Personal Information if we believe it is reasonably necessary to: [c]omply with valid legal process (e.g., subpoenas, warrants)..." (*6*). And in the wake of the Golden State Killer arrest, GEDmatch has altered its terms of service to explicitly permit law enforcement use of its database to investigate homicides and sexual assault (*7*). Although these disclaimers are usually unambiguous, they are sometimes buried in terms of service or privacy policies that many individuals do not take care to read or fully understand.

Despite the lack of legal protection against law enforcement searches of nonforensic databases, such searches may run counter to core values of American law. The Fourth Amendment is a constitutional commitment to protect fundamental civil rights. Part of that is a commitment to protecting privacy or freedom from government surveillance. Police cannot search a house without suspecting a specific individual of particular acts—even if doing so would enable the police to solve many more crimes. Yet, database searches permit law enforcement to search the genetic data of each database member without any suspicion that a particular member is tied to a particular crime. Although the U.S. Supreme Court has approved suspicionless genetic searches for individuals with diminished expectations of privacy, like those arrested or convicted of crimes (*8*), ordinary members of the public are different. Familial searches, like those used in the Golden State Killer investigation, are an even further departure from the Supreme Court standard. Certainly, individuals who commit crimes and leave their DNA behind forfeit any expectation of privacy in that DNA. But a usable forensic identification requires two matching parts: a crime scene sample and a database profile that matches it. Suspects identified through familial searches cannot be said to have voluntarily shared their genetic profile in a database of known individuals, even if a genetic relative has.

The Supreme Court is poised to reconsider its broad rule that the voluntary sharing of data negates expectations of privacy—and thus negates Fourth Amendment protections against warrantless government searches. In *Carpenter* v. *United States*, the Supreme Court will determine whether police must obtain a warrant to justify access to historical cell phone records revealing the movements and location of a cell phone user over a long period of time (*9*). In the digital age, in which nearly all data are at least nominally shared with third parties like internet service providers, website hosts, and cell phone companies, the current rule means that the Fourth Amendment often does not apply. *Carpenter* may reshape this rule to account for the realities of a big-data world. A ruling in *Carpenter* that limits police use of historical cell phone data may substantially affect police practices surrounding genetic data as well, as merely sharing data with another might well be insufficient to permit its suspicionless search by the government for crime-detection purposes.

Even if the Supreme Court decision in *Carpenter* does not revamp Fourth Amendment rules governing police access to shared data, the setting of that case suggests another way to resolve concerns about police access to nonforensic genetic databases. In the Stored Communications Act, Congress provided substantial statutory protection for email and other digital information maintained on the internet. Under the act, a court may order disclosure of electronic records if the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation" (*10*). This standard is less onerous than the Fourth Amendment's warrant requirement, but it is notably more demanding than any protections the law currently provides.

Enacting similar protection for genetic data stored in nonforensic databases would ensure that the government cannot subject ordinary individuals to suspicionless genetic searches, while allowing investigators to access genetic data where there is reason to believe a particular individual may be tied to a particular crime. A Stored Genetics Act would likely render law enforcement searches of nonforensic genetic databases unlawful for crime-detection purposes, as there can be no "specific and articulable" connection between particular database records and a particular crime when investigators seek to use such a search to generate leads, not investigate them. Thus, although such an approach would preserve freedom from perpetual genetic surveillance by the government, it may well result in fewer solved cases.

Legislatures may understandably be loath to enact a total prohibition of such searches. At a minimum, however, policy-makers should delineate under what circumstances such searches are acceptable. For example, several states, including California, Colorado, and Texas, have identified prerequisites to the use of familial searches of the state's own forensic database, including that the crime to be investigated is serious and that traditional investigative techniques have been exhausted without success (*11*). Similar constraints could be placed on law enforcement searches of nonforensic databases. The challenge of this approach is that limitations on the scope of use can erode quickly. Thus, although Colorado's policy governing familial searches of the state's forensic database limits such searches to crimes with "significant public safety concerns," police in that state used a familial search to solve a car break-in where the perpetrator "left a drop of blood on a passenger seat when he broke a car window and stole $1.40 in change" (*11*). The erosion of limits on crime-solving technology may well be inevitable, and it threatens our collective civil liberties and opens the door to socially and politically unacceptable genetic surveillance.

Whatever legislative solution is adopted, it must at least take into account public perspectives to clearly delineate acceptable uses and balance the social benefit of solving cases with individuals' interests in avoiding unwarranted government scrutiny. ■

ILLUSTRATION: LUSH/123RF

REFERENCES AND NOTES

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Uploaded by: Elliott, Richard DeShay
Position: FAV

NEWS RELEASE

FOR IMMEDIATE RELEASE
2021 LEGISLATIVE SESSION

Contact: Martin Mitchell
President
410-493-7966/president@pgcyd.com

Prince George's County Young Democrats

Prince George's County, MD - The membership of the Prince George's County Young Democrats Legislative Committee have voted to support the following coalitions and legislation:

Coalitions

- **UMD Black Student Leaders**
- **Sunrise Movement- Baltimore**

Resolutions in SUPPORT

DELEGATE JULIAN IVEY (D47A)

- **HB332: Renewable Energy Portfolio Standard - Eligible Sources**
- **HB702: Higher Education - Standardized Tests - Prohibition of Use in Student Admissions**
- **HB142: Income Tax - Student Loan Debt Relief Tax Credit - Alterations**
- **HB722: Procurement - Disparity Studies - African American-Owned Businesses**
- **HB723: Public Institutions of Higher Education – Incarcerated and Formerly Incarcerated Individuals – Academic and Employment Opportunities**
- **HB703: Transportation - I-270 and I-495 - Prohibition on Adding New Lanes**
- **HB705: Transportation – I–270 and I–495 – Prohibition on Toll Lanes (Stop Unnecessary Toll Lanes Act of 2021)**

  CANTU AMENDMENT: In the event of said toll lanes, that the fines generated by toll lanes contribute to public transportation and air quality improvement, including tree planting.
- **HB725: Constitutional Amendment - Legislative Sessions**

  FRIAS AMENDMENT: This legislation will appropriate ½ of current appropriations for staff and associated workers as is appropriated for the 90 day session, for each of said newly created legislative sessions.

SENATOR CHARLES SYDNOR (D44)

- **SB187: Criminal Procedure – Forensic Genetic Genealogical DNA Analysis, Searching, Regulation, and Oversight**
- **SB55: Legislative Department - Eligibility to Serve as Senators and Delegates - Place of Abode**
- **SB166: Criminal Procedure - Police Officers - Duty to Report Misconduct (Maryland Police Accountability Act)**

Written By:

Phylicia Henry, *Chair of Legislative Affairs as a Whole.*
Janna Parker, *Chair of County Affairs.*
Hugo E. Cantu, *Vice Chair of County Affairs.*
Richard DeShay Elliott, *Chair of State Affairs.*

Interested members of the general public are encouraged to engage with PGCYD, regardless of geographic location, as long as they meet two criteria: they are registered Democrats or Independents and are interested in serving the greater good for our communities.

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- **SB590: Criminal Procedure - Required Disclosures - Brady Material**
- **SB456: Office of the State's Attorney - Collection and Publication of Prosecutorial Information**
- **SB588: Law Enforcement Officers - Creditability of Witnesses and Misconduct Database (Maryland Police Accountability Act of 2021)**

  ELLIOTT AMENDMENT: Said database has the requirement to transfer in data from other states' misconduct databases.

  SENATOR JILL P. CARTER (D41)
- **SB482: Public Safety - Law Enforcement Officers - Whistleblower Protections**
- **SB419: No-Knock Warrants - Elimination**

  CANTU/PARKER AMENDMENT: If a Sheriff's office or other policing agency is found to be executing or pursuing a no-knock warrant following the passage of this bill, there will be a fine of no less than $10,000 than it is earmarked for the jurisdiction's Public Defender's Office with said funding coming from their operating budget of said policing agencies without the ability to supplement or supplant said fines in future budgets.

  DELEGATE C.T. WILSON (D28)
- **HB11: Public Schools - African American History - Development of Content Standards and Implementation**
- **HB106: Office of the Attorney General - Website to Report Robocalls and Other Spam Calls**

  SENATOR CLARENCE LAM (D12)
- **SB234: Personal Information - State and Local Agencies - Restrictions on Access**

  PRINCE GEORGE'S COUNTY HOUSE DELEGATION CHAIR, DELEGATE EREK BARRON (D24)
- **PG-414: Prince George's County – Public Safety and Behavioral Health Surcharges – Behavioral Health Programs**

  ELLIOTT/CANTU AMENDMENT: This legislation will disallow the purchase of firearms and/or tactical gear with this surcharge's revenue.

  DELEGATE JAZZ LEWIS (D24)
- **HB409: Juveniles Convicted as Adults - Sentencing - Limitations and Reduction (Juvenile Restoration Act)**

  DELEGATE ALONZO WASHINGTON (D22)
- **PG-506-21: Prince George's County – Board of Education – Student Member Voting and Member Candidacy**

  DELEGATE DEBRA M. DAVIS (D28)
- **HB414: Southern Maryland Rapid Transit Project – Funding**

Written By:

Phylicia Henry, *Chair of Legislative Affairs as a Whole.*
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DELEGATE ANDREA FLETCHER-HARRISON (D24)

- **HB448: State Government - Legal and Employee Holiday - Juneteenth National Freedom Day**

DELEGATE SHEREE SAMPLE-HUGHES (D37A)

- **HB667: General Provisions - State Song - Repeal**

DELEGATE BRIAN CROSBY (D29B)

- **HB655: Local Government – County Commissioner Elections – District Voting**

DELEGATE BROOKE LIERMAN (D46)

- **HB114: Maryland Transit Administration - Funding (Transit Safety and Investment Act)**

DELEGATE DARRYL BARNES (D25)

- **HB453: Health - Medical Cannabis Reauthorization Act**

DELEGATE ROBIN GRAMMER (D6)

- **HB415: Firearms – Right to Purchase, Own, Possess, and Carry – Medical Cannabis**

Resolutions in OPPOSITION

SPEAKER ADRIENNE FERGUSON (D10) & SENATE PRESIDENT BILL FERGUSON (D46)

- **HB0740/SB0576: Building Opportunity Act of 2021**

CANTU AMENDMENT: The Maryland Stadium Authority will be granted at least one member on the Governing Board by a majority vote among the Prince George's County House Delegation, with recommendations coming from Prince George's County stakeholders.

DELEGATE DAN COX (D4)

- **HB17: Public Safety - Emergency Powers Limitations (Consent of the Governed Act)**
- **OPPOSING the in-person reopening of the Prince George's County Public Schools system, as COVID is even more contagious and dangerous than when schools first closed down, and many teachers and community elders remain unvaccinated.**

CANTU/HARRIS AMENDMENT: Dedicated resources to close the virtual learning gap, establishing guidelines for school resources to assist students, such as providing food and laptops, and using best practices from other successful virtual learning programs

"*The members of PGCYD remain committed to amplifying their voices on potential policy decisions that could impact their communities and daily life. We look forward to working with our elected leaders to ensure that public policy presented before us, is for us and for the betterment of everyone, and not just a select few*"

Chair of Legislative Affairs As A Whole, Phylicia Henry

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Written By:

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SB0187_DNA_Searches_MLC_FAV.pdf
Uploaded by: Plante, Cecilia
Position: FAV

TESTIMONY FOR SB0187
CRIMINAL PROCEDURE – FORENSIC GENETIC GENEALOGICAL DNA ANALYSIS, SEARCHING, REGULATION, AND OVERSIGHT

Bill Sponsor: Senator Sydnor
Committee: Judicial Proceedings
Organization Submitting: Maryland Legislative Coalition
Person Submitting: Cecilia Plante, co-chair
Position: FAVORABLE

I am submitting this testimony in favor of SB0187 on behalf of the Maryland Legislative Coalition. The Maryland Legislative Coalition is an association of activists - individuals and grassroots groups in every district in the state. We are unpaid citizen lobbyists and our Coalition supports well over 30,000 members.

Our members are shocked that anyone would be able to search genetic data and look at DNA evidence without a judicial authorization and a clear crime that they are investigating. We find that searches of this data to be an intrusion and are very frightening. We would like to see much more oversight on this kind of analysis and searching and believe this bill is an excellent step forward in requiring protections for Marylanders.

We support this bill and recommend a **FAVORABLE** report in committee.

Ram et al_Science_2018.pdf
Uploaded by: Ram, Natalie
Position: FAV

POLICY FORUM

GENETICS AND PRIVACY

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The case of the Golden State Killer is not the first instance of investigators turning to nonforensic DNA databases to generate leads. This was not even the first time investigators used genealogical DNA matches to develop and pursue a suspect in the Golden State Killer case itself. A year before investigators zeroed in on DeAngelo, they subpoenaed another genetic testing company for the name and payment information of one of its users and obtained a warrant for the man's DNA. He was not a match. Similarly, in 2014, Michael Usry found himself the target of a police investigation stemming from a partial genetic match between his father's DNA, stored in an Ancestry.com database, and DNA left at a 1996 murder scene. On the basis of the partial match, police were able to obtain a court order requiring Ancestry.com to disclose the identity of the database DNA match. After mapping out several generations of Usry's father's family, investigators zeroed in on Usry, eventually securing a warrant for his DNA. Ultimately, Usry was cleared as a suspect when his DNA proved not to match the crime scene DNA.

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There are few legal roadblocks to police use of genetic databases intended to help individuals explore their health or identify genetic relatives. The Fourth Amendment's protection against warrantless searches and seizures generally does not apply to material or data voluntarily shared with a third party, like a direct-to-consumer genetics testing or interpretation company or a genetic matching platform like GEDmatch. Once an individual has voluntarily shared her data with a third party, she typically cannot claim any expectation of privacy in those data—and so the government need not secure a warrant before searching it.

Beyond the Constitution, three federal laws protect some genetic data against certain disclosures, but these too are unlikely to provide an effective shield against law enforcement searches in nonforensic genetic databases. The Genetic Information Nondiscrimination Act (GINA) protects genetic data, but only against certain uses by employers and health insurers (*2*). GINA provides no protection against law enforcement searches. Similarly, most companies and websites offering DNA testing, interpretation, or matching services directly to individuals likely are not covered by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, which governs the use and disclosure of identifiable health information. These providers are usually careful to explain that they are not engaged in health care or the manipulation or provision of health data (*3*). Finally, although certificates of confidentiality protect scientific researchers from disclosing data to law enforcement—even against a warrant (*4*)—they do not extend to scenarios in which law enforcement is just another contributor to and user of online genetic resources, such as public databases and matching tools. Certificates of confidentiality have faced few challenges in court, and so it is also uncertain whether the protection they purport to provide will hold up against a challenge by law enforcement seeking access.

Consistent with this legal landscape, companies and websites that generate, interpret, or match genetic data directly for individuals often do not promise complete protection. In terms of law enforcement, for instance, 23andMe states in its privacy policy, "23andMe will preserve and disclose any and all information to law enforcement agencies or others if required to do so by law or in the good faith belief that such preservation or disclosure is reasonably necessary to…comply with legal or regulatory process (such as a judicial proceeding, court order, or government inquiry)…" (*5*). Ancestry.com similarly

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discloses, "We may share your Personal Information if we believe it is reasonably necessary to: [c]omply with valid legal process (e.g., subpoenas, warrants)..." (*6*). And in the wake of the Golden State Killer arrest, GEDmatch has altered its terms of service to explicitly permit law enforcement use of its database to investigate homicides and sexual assault (*7*). Although these disclaimers are usually unambiguous, they are sometimes buried in terms of service or privacy policies that many individuals do not take care to read or fully understand.

Despite the lack of legal protection against law enforcement searches of nonforensic databases, such searches may run counter to core values of American law. The Fourth Amendment is a constitutional commitment to protect fundamental civil rights. Part of that is a commitment to protecting privacy or freedom from government surveillance. Police cannot search a house without suspecting a specific individual of particular acts—even if doing so would enable the police to solve many more crimes. Yet, database searches permit law enforcement to search the genetic data of each database member without any suspicion that a particular member is tied to a particular crime. Although the U.S. Supreme Court has approved suspicionless genetic searches for individuals with diminished expectations of privacy, like those arrested or convicted of crimes (*8*), ordinary members of the public are different. Familial searches, like those used in the Golden State Killer investigation, are an even further departure from the Supreme Court standard. Certainly, individuals who commit crimes and leave their DNA behind forfeit any expectation of privacy in that DNA. But a usable forensic identification requires two matching parts: a crime scene sample and a database profile that matches it. Suspects identified through familial searches cannot be said to have voluntarily shared their genetic profile in a database of known individuals, even if a genetic relative has.

The Supreme Court is poised to reconsider its broad rule that the voluntary sharing of data negates expectations of privacy—and thus negates Fourth Amendment protections against warrantless government searches. In *Carpenter* v. *United States*, the Supreme Court will determine whether police must obtain a warrant to justify access to historical cell phone records revealing the movements and location of a cell phone user over a long period of time (*9*). In the digital age, in which nearly all data are at least nominally shared with third parties like internet service providers, website hosts, and cell phone companies, the current rule means that the Fourth Amendment often does not apply. *Carpenter* may reshape this rule to account for the realities of a big-data world. A ruling in *Carpenter* that limits police use of historical cell phone data may substantially affect police practices surrounding genetic data as well, as merely sharing data with another might well be insufficient to permit its suspicionless search by the government for crime-detection purposes.

Even if the Supreme Court decision in *Carpenter* does not revamp Fourth Amendment rules governing police access to shared data, the setting of that case suggests another way to resolve concerns about police access to nonforensic genetic databases. In the Stored Communications Act, Congress provided substantial statutory protection for email and other digital information maintained on the internet. Under the act, a court may order disclosure of electronic records if the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation" (*10*). This standard is less onerous than the Fourth Amendment's warrant requirement, but it is notably more demanding than any protections the law currently provides.

Enacting similar protection for genetic data stored in nonforensic databases would ensure that the government cannot subject ordinary individuals to suspicionless genetic searches, while allowing investigators to access genetic data where there is reason to believe a particular individual may be tied to a particular crime. A Stored Genetics Act would likely render law enforcement searches of nonforensic genetic databases unlawful for crime-detection purposes, as there can be no "specific and articulable" connection between particular database records and a particular crime when investigators seek to use such a search to generate leads, not investigate them. Thus, although such an approach would preserve freedom from perpetual genetic surveillance by the government, it may well result in fewer solved cases.

Legislatures may understandably be loath to enact a total prohibition of such searches. At a minimum, however, policy-makers should delineate under what circumstances such searches are acceptable. For example, several states, including California, Colorado, and Texas, have identified prerequisites to the use of familial searches of the state's own forensic database, including that the crime to be investigated is serious and that traditional investigative techniques have been exhausted without success (*11*). Similar constraints could be placed on law enforcement searches of nonforensic databases. The challenge of this approach is that limitations on the scope of use can erode quickly. Thus, although Colorado's policy governing familial searches of the state's forensic database limits such searches to crimes with "significant public safety concerns," police in that state used a familial search to solve a car break-in where the perpetrator "left a drop of blood on a passenger seat when he broke a car window and stole $1.40 in change" (*11*). The erosion of limits on crime-solving technology may well be inevitable, and it threatens our collective civil liberties and opens the door to socially and politically unacceptable genetic surveillance.

Whatever legislative solution is adopted, it must at least take into account public perspectives to clearly delineate acceptable uses and balance the social benefit of solving cases with individuals' interests in avoiding unwarranted government scrutiny. ■

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ACKNOWLEDGMENTS

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Genealogy databases and the future of criminal investigation

Natalie Ram, Christi J. Guerrini and Amy L. McGuire

Science **360** (6393), 1078-1079.
DOI: 10.1126/science.aau1083

Ram_bio.pdf
Uploaded by: Ram, Natalie
Position: FAV

Natalie Ram

Natalie Ram is Professor of Law at the University of Maryland Carey School of Law, where she is a member of the Law and Health Care Program and a 2021 Greenwall Faculty Scholar in Bioethics. Professor Ram is a nationally recognized authority on the law and ethics of forensic genetic investigation, particularly involving the use of non-law enforcement derived genetic data.

Professor Ram's work has been published in leading journals in both law and science, including *Harvard Law Review*, *Stanford Law Review*, *Columbia Law Review*, *Virginia Law Review*, and *Northwestern Law Review*, as well as in *Science* and *Nature Biotechnology*. She has published op-eds in the *New York Times* and *Slate*, appeared on CNN, national radio broadcasts *Science Friday*, *Here & Now*, and *Reveal*, and been quoted in the *Wall Street Journal*, *Washington Post*, *Wired*, and *BuzzFeed News*. Her work has been cited by courts and advocates.

Before joining Maryland Carey Law, Professor Ram clerked for Judge Guido Calabresi, U.S. Court of Appeals for the Second Circuit, and for Associate Justice Stephen G. Breyer, U.S. Supreme Court. Subsequently, she worked in the Appellate and Supreme Court Litigation Group at Morrison & Foerster in Washington, D.C. From 2014 to 2019, Ram taught at the University of Baltimore School of Law. Professor Ram earned her JD at Yale Law School and AB in public and international affairs at Princeton University.

Ram_SB 187 written testimony.pdf
Uploaded by: Ram, Natalie
Position: FAV

Written testimony of Prof. Natalie Ram supporting Senate Bill 187

I write to support Senate Bill 187, concerning forensic genetic genealogy ("FGG"). If Maryland is to permit FGG, SB 187 provides a robust statutory scheme for balancing public safety, privacy, and criminal justice. I encourage this Committee to support this bill.

Maryland has long been a leader in including meaningful limitations to protect ordinary individuals against routine DNA searches for crime detection purposes. It is therefore no surprise that Maryland is at the forefront of responsibly regulating FGG.

FGG occurs when investigators, often working with private companies, compare a DNA profile developed from crime scene evidence to other DNA profiles searchable on a consumer genetics platform. These searches may reveal genetic relatives of a putative perpetrator. Through sleuthing in the resulting family tree, investigators hope to identify the unknown perpetrator.

FGG is importantly different from traditional law enforcement searches in the statewide DNA database system. Traditional forensic DNA profiles consist of forty data points in non-coding DNA, while FGG profiles consist of hundreds of thousands of DNA data points strewn across the human chromosomes, including many in coding DNA. The statewide DNA database system is largely limited to individuals convicted of (or in some instances arrested for) a felony. *See* MD. CODE ANN., PUB. SAFETY § 2-504(a). By contrast, FGG involves consumer genetics platforms, populated by millions of individuals who may never have been arrested or convicted of any crime. Finally,

while traditional forensic identification relies on direct matches of crime scene evidence to known genetic profiles, FGG relies on familial ties to infer identification—a practice Maryland has forbidden in the statewide DNA database system. *Id.* § 2-506(d). In sum, compared with searches in the statewide DNA database system, FGG uses more genetic data, more sensitive genetic data, and likely exposes a majority of Marylanders to genetic identification—even if they have never used a consumer genetics service themselves.

FGG thus merits close regulation, if it is to be undertaken at all. SB 187 fits that bill. SB 187 includes several noteworthy safeguards. Like a U.S. Department of Justice interim policy, SB 187 authorizes FGG only for the most serious crimes and only after traditional investigative methods have been exhausted. *See* U.S. DEP'T OF JUSTICE, INTERIM POLICY: FORENSIC GENETIC GENEALOGY DNA ANALYSIS AND SEARCHING (Nov. 1, 2019), https://www.justice.gov/olp/page/file/1204386/download.

Maryland's bill also adopts additional protections essential to regulating use of this new investigative method. First, SB 187 requires both laboratories and genetic genealogists participating in an investigation to be licensed by the State. Licensure is crucial to enhancing confidence in the quality of leads generated through FGG. In particular, licensure for genetic genealogists is critically needed, as currently there are no professional standards for this work.

Second, SB 187 establishes robust procedures for obtaining additional DNA samples where appropriate. These procedures require obtaining informed consent for genetic samples from non-suspect third parties who may be related to a putative

perpetrator and whose DNA may be needed to fill in a genealogical family tree. The procedures also permit, under narrow circumstances, a court-approved process for obtaining a DNA sample from an individual without that individual's knowledge. Informed consent and judicial oversight, respectively, are essential to protecting the privacy of ordinary Marylanders against potentially overzealous investigative efforts.

Third, SB 187 provides for defense access to FGG, where appropriate. Permitting access to FGG for criminal defendants, and not just prosecutors, is vital to advancing justice and ensuring that only the guilty are convicted.

Fourth, SB 187 requires reporting and review of how, and how often, Maryland investigators or defense counsel pursue FGG. This provision will enable Maryland to exercise informed review of FGG and adapt state policy as needed.

Finally, I understand that pending amendments to SB 187 affirm user control over the investigative use of genetic data by requiring consumer genetics platforms to obtain informed consent from—and not merely give explicit notice to—their users regarding law enforcement use. Consent to law enforcement matching requires more than a disclosure buried deep in a site's terms of service or privacy policy. Requiring informed consent will better achieve SB 187's intent that ordinary site users knowingly submit genetic data for law enforcement use.

This body has consistently acted to regulate law enforcement use of genetic data with public safety, privacy, and criminal justice in mind. Maryland's DNA database is largely limited to individuals convicted of a felony. *See* MD. CODE ANN., PUB. SAFETY § 2-504(a). While Maryland law permits DNA to be collected from certain

individuals merely charged (but not yet convicted) of crimes, these individuals must be charged with a "crime of violence," burglary, or an attempt to commit these crimes. *Id.* § 2-504(a)(3)(i). The State must automatically destroy and expunge any such DNA samples and records if the prosecution for which DNA was collected is unsuccessful. *Id.* § 2-511(a). Maryland has also explicitly prohibited familial searches in the State's own database. *Id.* § 2-506(d). To be sure, the scope of Maryland's statewide DNA database system and repository has expanded over time to include a greater range of criminal convictions and to authorize DNA sampling from some arrestees. But Maryland has undertaken these expansions incrementally, with due regard to the privacy interests of Marylanders who may be implicated. SB 187 seeks this same balance—and it is a praiseworthy example of it.

I have written and testified previously supporting efforts to bar forensic genetic genealogy as unlawful familial searching. My views have not changed. But SB 187 is thoughtful, well considered, and comprehensive. If Maryland is to support forensic genetic genealogy in at least some cases, SB 187 establishes critical safeguards for its use within an appropriate regulatory framework.

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Position: FAV

ACLU Maryland

Testimony for the Senate Judicial Proceedings Committee
February 4, 2021

SB 187 – Criminal Procedure – Forensic Genetic Genealogical DNA Analysis, Searching, Regulation, and Oversight

FAVORABLE

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The ACLU of Maryland supports SB 187, which regulates and provides important oversight for how law enforcement may be authorized to conduct forensic genetic genealogical DNA analysis and search ("FGGS" public genealogical databases.

The ACLU-MD fights to expand privacy rights and increase individuals' control over their personal information, and ensure that civil liberties are not compromised by technological advances.

Testing DNA can result in tremendous benefits – from treating health risks to reuniting families, and proving claims of wrongful imprisonment. However, those benefits also come at a cost, because of the deeply personal and intimate information contained in our DNA. DNA testing does not just expose ourselves to privacy concerns, but also our parents, distant relatives, and even relatives not yet born.

Marylanders should not need to choose whether to take advantage of the benefits of new technologies while giving up their civil liberties. That is why it is so important to strictly guard this process, so that as new technologies being more interwoven into different aspects of our society, we are not forced to compromise our rights as individuals.

SB 187 was carefully drafted with the input of law enforcement, leading privacy experts, civil rights organizations, and industry specialists, to appropriately balance these two important interests. It establishes strict guardrails that prevent abuse and protect Marylanders' intimate personal information.

Some of these important guardrails include:

- judicial authorization of the FGGS process;
- strict limits of the types of cases for which FGGS may be authorized, and necessary steps that law enforcement must meet to acquire judicial authorization;
- limits to the length and scope of the search;

ACLU
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Maryland

- informed and explicit consent in writing of any third party for whom collection is sought;
- a process for continued judicial oversight over the process; and
- a process for the clear destruction of all samples and information after the search is completed.

Additionally, community involvement in reviewing the mandatory reporting and helping to issue policy guidelines – including from civil and privacy rights organizations, racial justice experts, criminal justice researchers, and organizations representing families directly impacted by the criminal legal system – will help ensure that the use of this technology does not overstep in ways that increase the threat to communities.

While this technology presents an important tool to accomplish important societal goals, it also presents grave threats to our privacy and liberty when abused. SB 187 has delicately navigated that balance, and we therefore strongly urge the committee to resist any efforts to weaken the guardrails, which would put us all at greater risk.

For the foregoing reasons, the ACLU of Maryland urges a favorable report on SB 187.

SB187 - CGDP - Favorable w Amendments .pdf
Uploaded by: McDonough, Caitlin
Position: FWA

COALITION FOR GENETIC DATA PROTECTION

February 4, 2021

The Honorable William C. Smith, Jr.
Chair, Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East
11 Bladen Street
Annapolis, MD 21401

Dear Chair Smith:

SENATE BILL 187 – CRIMINAL PROCEDURE – FORENSIC GENETIC GENEALOGICAL DNA ANALYSIS, SEARCHING, REGULATION AND OVERSIGHT

TESTIMONY IN SUPPORT WITH AMENDMENTS

The Coalition for Genetic Data Protection (CGDP) serves to provide a unified and proactive voice to advance policies that ensure the privacy and security of an individual's genetic data and enable responsible innovation. Consumer genetic testing can empower consumers to take a proactive role in their health, **wellness**, ethnicity, and origin in unprecedented ways – and millions of consumers have taken advantage of these opportunities. At the same time, genetic data provides unprecedented opportunities for the research community to better understand the role genetics play in our health and well-being as a human population. While we recognize the significant opportunities genetic testing and research present, we also support and advocate for reasonable and uniform privacy regulation that will ensure the responsible and ethical handling of every consumer's genetic data.

Senate Bill 187 (SB187), as introduced, establishes that certain forensic genetic genealogical DNA analysis and searches may not be initiated without a valid, designated legal process and lays out a framework for the use of commercially gathered genetic information for forensic purposes. Keeping with the intent of SB187, CGDP and its members have already implemented best practices around the privacy and protection of the genetic data they gather, including requiring a valid legal process for the disclosure of genetic data to law enforcement and full transparency around that disclosure. Therefore, CDGP is supportive of SB187 with amendments.

CGDP's proposed amendments (attached) would apply SB187 only to direct-to-consumer genetic service companies that participate in forensic genealogy searches and, therefore, permit the forensic searches that SB187 seeks to regulate. Under the proposed amendments, an organization that does **not** engage in or permit forensic searches of the genetic data it gathers would not be subject to the additional regulatory requirements created by the legislation. This has the benefit of incentivizing companies that gather and maintain genetic information to be strong stewards of that private information, particularly in regard to its use for forensic purposes.

Additionally, CGDP urges the adoption of amendments to SB187 that strike state licensure requirements by the Office of Healthcare Quality (OHCQ) for laboratories conducting SNP or other sequencing-base testing, so long as those laboratories are already certified under the Clinical Laboratory Improvement Amendments (CLIA). While SB187 seeks to answer the question of "if and when commercially-gathered genetic data should be accessed by law enforcement for forensic purposes", it does not question the underlying science of genetic research or laboratories performing genetic services, which are already highly regulated. The addition of another certification or licensure process for labs that are already CLIA-certified is redundant and unnecessary for the intent of the legislation and would create a new administrative burden for the both the labs and the regulatory body, in this case the OHCQ.

CGDP

The CGDP thanks Senate Sydnor for his willingness to work with CGDP, its members and all stakeholders on this legislation and urges a favorable committee report on SB187 with the proposed amendments.

Sincerely,

Eric Heath
Chief Privacy Officer
Ancestry

Jacquie Haggarty
VP, Deputy General Counsel & Privacy Officer
23andMe

Steve Haro
Executive Director
Coalition for Genetic Data Protection

cc:

OPD Forensics Division SB0187 Written Testimony.pd

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Position: FWA

MARYLAND OFFICE OF THE PUBLIC DEFENDER- FORENSICS DIVISION
Suggested Revisions of Senate Bill 187
Criminal Procedure – Forensic Genetic Genealogical DNA Analysis, Searching, Regulation, and Oversight

We express our gratitude to Senator Sydnor and Delegate Shetty for their foresight in recognizing that the use of Forensic Genetic Genealogical Searches (FGGS) must be carefully and comprehensively regulated in a way that ensures policies and practices properly reflect a commitment to respect individual privacy and civil liberties. We believe that it is imperative that both law enforcement agencies and non-state actors use FGGS in a manner consistent with the requirements and protections of the Constitution and other legal authorities. Moreover, the information and data derived from FGGS must be handled in accordance with applicable laws, regulations, policies, and procedures. We have, therefore, drafted certain revisions and additions to the bill that we believe will both strengthen the law and provide the protections that the citizens of Maryland deserve whenever a powerful new law enforcement technology like FGGS is introduced.

First, to ensure transparency and to protect a criminal defendant's rights to due process and a fair trial it is imperative that a defendant is provided the results and supporting data whenever a FGGS is conducted. As currently drafted, law enforcement agencies are not required to disclose to the defendant in a criminal proceeding when FGGS was conducted. If the past is any guide, whenever a new forensic technology is adopted by law enforcement, some agencies tend to hide the fact that it's been used. It is imperative that the use of this type of data be disclosed any time it is sought, and that all police reports, court documentation, and forensic case files be tendered to the defense. We believe that a defendant's constitutional rights to due process and to present a defense require that a proper balance be struck between those rights and any confidentiality concerns. Therefore, we propose adding specific disclosure requirements when a FGGS leads to criminal charges against an individual.

Second, the statute as drafted permits third party investigators working for post-conviction defendants to surreptitiously collect DNA under court supervision. Since these investigators are not State actors, the constitutional protections afforded to criminal defendants – including the 4th Amendment's prohibition against unreasonable searches and seizures – do not apply. This creates a potential end run around the constitution if the post-conviction investigation then implicates another person. Because these investigators would be acting in a quasi-law enforcement capacity (their actions may lead to the arrest and charging of individuals), we propose that they be treated as such. If the collection of evidence using FGGS would violate the State or Federal constitutions if conducted by a State actor rather than an investigator under this statute, it should not be used for the determination of probable cause and should be inadmissible in any proceeding against that individual.

Third, FGG examines more than half a million single nucleotide polymorphisms ('SNPs'), which replace the STR DNA markers analyzed in traditional forensic DNA typing. These SNPs span the entirety of the human genome, and can reveal physical characteristics such as race and ethnicity through a technique called forensic DNA phenotyping ('FDP'). Although not explicitly the focus of FGGS, the fact that this technology grants law enforcement access to such sensitive information is incredibly concerning. Because this technology can, among other things, be used to generate new forms of racial profiling, this bill must specifically prohibit FDP, in the same way that it prohibits the use of this data to determine predisposition for disease, medical conditions, or psychological traits.

Fourth, since the Office of the Public Defender (OPD) most likely be representing a majority of defendants arrested and charged pursuant to FGGS investigations we believe that provision establishing an oversight panel should require that representative(s) of the OPD be assigned to this panel. We also believe that the panel's charge must be broadened to include more than simply reviewing the annual report to include policy recommendations and revisiting this statute as necessary.

This bill is an important first step to regulate this are of science that has the potential to be highly invasive. We have tendered to both sponsors amendments that we believe address the concerns that we have set forth above. Our official position is that we support the bill with amendments.

MD Judiciary - Testimony SB 187.pdf
Uploaded by: Elalamy, Sara
Position: UNF

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO:	Senate Judicial Proceedings Committee
FROM:	Legislative Committee Suzanne D. Pelz, Esq. 410-260-1523
RE:	Senate Bill 187 Criminal Procedure – Forensic Genetic Genealogical DNA Analysis, Searching, Regulation and Oversight
DATE:	January 27, 2021 (2/4)
POSITION:	Oppose

The Maryland Judiciary opposes Senate Bill 187. This bill adds sections § 17-101 through § 17-105, "Forensic Genealogy", to the Criminal Procedure Article. Several terms are defined in §17-101, including "Forensic Genetic Genealogical DNA Analysis and Search or FGGS", which means "the forensic genetic genealogical DNA service to find individuals related to the source of the FGG profile and a genealogical search using public records and other lawful means to obtain information in accordance with the regulations under this title." Another term defined is "FGG profile" which "means a genetic profile using SNPs or other sequencing methods generated from a forensic or reference sample by a laboratory for the purpose of conducting a FGGS."

First, the bill requires at Criminal Procedure § 17-105(b) that judges participate in a panel that reviews the annual Forensic Genetic Genealogical report submitted by the Department of Public Safety and Correctional Services to the Governor. The Judiciary believes that it is inappropriate for judges to participate in such a panel and review such reports.

Second, the Judiciary believes that § 17-102(b)(1), as written, may cause confusion when courts seek to apply the bill because that subsection lists offenses for which FGGS may be initiated and it includes "murder, felony sexual assault, or an attempt to commit a violent crime other than homicide or sexual assault[.]" This wording suggests that, for example, a FGGS may be initiated for murder but not for attempted murder while, conversely, an FGGS may not be initiated for armed carjacking but could be initiated for attempted armed carjacking. This unusual categorization of covered offenses may lead to confusion and inconsistent application of the law.

Third, the bill distinguishes among the party requesting FGG profiles. Section 17-102(c) prohibits law enforcement from obtaining FGG profiles to determine if a suspect has a

particular medical or genetic condition. However, in post-conviction cases, a petitioner may obtain the FGG profiles for medical or genetic conditions under § 17-103(a)(3). The Judiciary is unclear whether this differentiation is intentional.

This bill would also be difficult to implement as it would require investigators to always notify the court before collecting a covert DNA sample which may not always be possible and could delay or prevent accurate investigations. In addition, the requirement for law enforcement to report back to the court every 30 days is impractical.

In addition, the bill states in §17-102(f)(3)(v)(2) that the DNA sample and any data obtained from it will be destroyed when the investigation or any criminal case arising from the investigation ends. Yet, in §17-102(h)(1) the bill provides that the court can issue orders to ensure all samples gathered are destroyed on completion of any criminal prosecution that may arise from the FGGS. These provisions are inconsistent and need to be defined as an individual is subject to criminal penalties for not complying with this section.

Section 17-102(b)(2) also provides that the forensic sample was collected from a crime scene, a person, an item, a location connected to the criminal event, or the unidentified human remains of a suspected homicide victim. It is unclear if this also applies to an identified victim.

Further, reasonable investigative leads typically involve google searches and cell phone data which can be slow to obtain. This bill provides, however, that FGGS may not be initiated until reasonable investigative leads have been tried and failed. This could delay the process.

It is also not clear who provides the third party notice required under §17-102(f)(3)(v). The bill also does not define "intrusive surveillance."

This bill also dictates in §17-103 that the court will take evidence and ultimately have a trial within a trial based on the filing of an affidavit. This is unusual and problematic.

Finally, the provision requiring an explanation of need by defense counsel may be difficult to implement as counsel would have to disclose information to the court, and the State, they otherwise could keep confidential until trial.

cc. Hon. Charles Sydnor
Judicial Council
Legislative Committee
Kelley O'Connor

SB 187 written testimony.pdf
Uploaded by: riley, joseph
Position: UNF

THE OFFICE OF
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Joseph A. Riley
State's Attorney

February 1, 2021

RE: SB187 Written Testimony
Judicial Proceedings
Chair Will Smith
Maryland Senate

Thank you for allowing me the opportunity to address you on the above proposed piece of legislation. Joseph James DeAngelo was born in 1945 and was a police officer. He was also responsible for the rapes of 50 individuals, 13 murders, and over 100 burglaries from 1973 to 1986. He evaded capture using his knowledge of police investigations, limits on DNA evidence at the time of the crimes, and failures of law enforcement agencies to communicate across organizations.

Having a suspect's DNA profile via a sexual assault examination kit (what this Bill describes as a "forensic sample" and a "FGG profile"), investigators attempted to match the suspect with known DNA profiles. Unsuccessful in that avenue, investigators used the profile to create a personal genome and uploaded it to their open source genealogical website GEDmatch (what this Bill calls "Publicly Available Open-Data Personal Genomics Database"). The website identified 10-20 people with a similar genetic profile. Investigators then used the list to construct a large family tree. From the tree, they found the suspect DeAngelo (AKA the Golden State Killer, the East Area Rapist, the Original Night Stalker).

GEDmatch did not have DeAngelo's DNA profile. Instead, after developing him as a suspect, investigators gained his DNA from samples he discarded (a trash can left out for pick up).

If those California investigators were operating under the restraints of Senate Bill 187 then it is likely he would still be roaming freely. Instead the perpetrator of these heinous acts is serving a life sentence in the California Penitentiary System. Instead of congratulating the ingenious methods used to capture this man who brutalized and

terrorized California for over a decade, this Bill makes sure that Maryland Law Enforcement never uses the same tactics if faced with the same scenario.

First, it bans the use of the investigative technique without judicial authorization. The Bill clearly avoids the use of the word warrant. To involve a neutral magistrate in the investigative process but, not requiring a warrant is akin to making investigators get judicial approval for record checks or the capture of DNA with sexual assault examinations.

Secondly, the Bill dictates what databases an investigation can utilize assuming they can get this judicial authorization. Making evidence obtained by law enforcement admissibility subject to a third parties rules. This is something novel in my experience as a prosecutor. Imagine if a gun dealer did not disclose to its customers that they would be subject to a background check. Then using this logic the State could not prosecute anyone who lied on an application.

Third, it creates an admissibility issue if the State violates the provisions spelled out in page three involving a third party. Typically, a Defendant who seeks to suppress evidence must have standing to satisfy such a claim. This Bill would negate that making what the State did (or did not do) with a third party a "get out of jail free card."

Fourth, this Bill again brings in judicial supervision (but not a warrant) if investigators seek to obtain DNA evidence from abandoned material (what this Bill calls, "Covert Reference Sample").

Fifth, this Bill creates a crime if investigators violate any of its provisions. Meaning a chilling effect if an investigator ever tries the tactics that led to the apprehension of a vile rapist and killer.

Sixth, the Bill creates a new way to collaterally attack a conviction by allowing convicted persons to do what the State may not. A defendant convicted of certain offenses may demand DNA testing of a forensic sample from any crime scene, person, or item collected from a location connected to the criminal event (by this definition it could be another case entirely from other jurisdictions). The only hurdle the convicted person would have to demonstrate is a "reasonable belief" (see SB 187 p. 8 ln. 10). The State must indulge the investigation using all the same tactics they cannot now use without judicial approval. In effect, it makes the State investigators the convicted person's private investigative team with no thought about compensation. The Maryland State's Attorneys Association seeks an unfavorable report on SB187

Joseph Riley
State's Attorney
Caroline County
MSAA Legislative Chair

SB 187 - Forensic Genetic Genealogical DNA.pdf
Uploaded by: Shellenberger, Scott
Position: UNF

Bill Number: SB 187
Scott D. Shellenberger, State's Attorney for Baltimore County
Opposed

WRITTEN TESTIMONY OF SCOTT SHELLENBERGER,
STATE'S ATTORNEY FOR BALTIMORE COUNTY
IN OPPOSITION OF SENATE BILL 187
FORENSIC GENETIC GENEALOGICAL DNA ANALYSIS, SEARCHING, REGULATION, AND OVERSIGHT

I write in opposition of Senate Bill 187 which would greatly hamper law enforcement in a useful and legal tool to solve crime?

I am hopeful that you remember the presentation done in Cambridge in 2019 on this important topic.

Maryland already has one of the most restrictive laws in the country regarding the testing of DNA samples.

Public Safety Article 2-506 states a person may not perform a search of the statewide DNA database for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired.

Does PS 2-506 (d) already prohibit familial DNA searches from a genealogical website? Probably not(No). Senate Bill 187 expands the current prohibition by requiring consent of a possible suspect to do genealogical DNA searches.

Senate Bill 187 also eliminates decades old existing 4th amendment and Supreme Court case law dealing with the concept of abandoned property. The courts have ruled that once a person discards an item, they no longer have a 4th amendment interest into the property. A person may abandon a coffee cup and a Detective may collect it from the trash to have the known DNA tested and compared to a sample from a rape or homicide. In Maryland, as it should, this match would only constitute probable cause and the State would be required to get a direct sample using a warrant or consent. Senate Bill 187 eliminates decades of settled law and court rulings. I would now need a JudGes permission to pick up trash. It would greatly hamper law enforcements ability to solve crime.

Senate Bill 187 would also eliminate the ability to perform genetic DNA searches without the consent of the possible murder Defendant, who is going to consent under these circumstances. So Senate Bill 187 would effectively make Maryland a State where virtually no genetic DNA searches are permitted.

One other problem found in 17-102 B (1) seems to limit the crimes to murder felony sexual offense and attempt to commit violent crimes. What about completed violent crimes.

How this works is unknown DNA from crime scene (Forensic DNA) is collected. A search is made in CODIS and no match is found, they then go to the genealogy website such as Ancestry.com or 23andMe.com. If they find someone that does not match, but has many similarities, it could be a relative such as a brother or sister (closest), cousin (farther), 2nd cousin (even farther) or 3rd cousin (farthest). Now they have to do old fashioned police work and still solve the crime of who did it. Why do we need this tool?

- Joseph DeAngelo from California was known as the Golden State Killer. This is the most famous case from 1974 through 1986 where he committed 50 rapes, 12 murders and was caught using a genealogy DNA search.
- William Talbott, II is from Washington State and was found guilty in 1987 of a double murder.
- John Miller is from Indiana and plead guilty in 1998 of murder and rape of an 8 year old, April Tinsley.
- Raymond Rowe is from Pennsylvania and received life without parole in 1992 for murder and sexual assault of a school teacher.
- Jesse Bjerke is from Virginia and plead guilty in 2016 for the abduction and rape of a female lifeguard.
- John Whitt is from North Carolina and confessed to the murder of his wife and son in 1998.
- Gary Hartman is from Washington State and murdered a 12 year old in 1986.
- Roy Waller is from California and committed 10 rapes from 1991 through 2006.
- Mark Manteuffel is from California and committed rape, sodomy and torture in 1992 and 1994.
- Michael DeVaughn is from Mississippi and committed murder and rape of 20 year old Jody Loomis in 1972.
- Terrence Miller is from Washington State and committed murder and sexual assault of an 81 year old in 1990.
- Eddie Anderson is from California and committed a murder of a 30 year old victim in 1976.
- Michael Henslick is from Illinois and committed murder of a 22 year old victim in 2009.
- Darold Bowden is from North Carolina and committed rape in 2006 through 2008.
- Luke Fleming is from Florida and committed rape and murder in 1999.
- Jerry Lee is from Georgia and committed murder of a 28 year old victim in 1997.
- Donald Perea is a deceased Defendant from Colorado. He committed murder and sexual assault of an 18 year old victim, Jeannie More in 1981.
- Paul Chartrand is a deceased Defendant from California who committed murder in 1979.

- Arthur Martinez is a deceased Defendant from California who committed two murders in 1977 and 1978.

All of these cases were solved using Genealogical DNA which Senate Bill 187 would severely limit. How many of the Defendant's I just mentioned would consent to testing? There are at least two dozen more.

It has already been used in Maryland to solve a crime. In 2007 through 2011 in Montgomery County, Marlon Michael Alexander committed a series of rapes. A GED match came back to two relatives. The family members helped identify Alexander and he pled guilty to two offenses. In 2019 he was found guilty of three rapes and was given a life sentence.

There is another side to this story.

Brian Dripps confessed to sexual assault and murder of 18 year old after a DNA genetic match. That match exonerated Christopher Tapp who was wrongfully convicted in 1996. He wasted 20 years of his life in jail. Would we want him to stay in jail in Maryland?

This method is also helpful in identifying unidentified bodies. Genealogy DNA match is used to identify the unidentified.

There can be some reasonable guidelines imposed by the law that don't essentially operate as a ban. The Federal Interim Guidelines have the below listed guidelines which Maryland could easily adopt:

- Violent Crimes or Threat to Public Safety
- All other leads exhausted
- Law Enforcement must ID self to company
- Only an investigative lead
- May not arrest solely on genetic association
- Must have tried and failed at CODIS
- Prosecutor permission

I am happy to work with anyone to draft a law that has reasonable limitations on law enforcement.

I urge and unfavorable report on Senate Bill 187 as written.

DPSCS_LOI_SB0187.pdf
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BILL: **SENATE BILL 187**

POSITION: **LETTER OF INFORMATION**

EXPLANATION: This bill establishes processes for obtaining Forensic Genetic Genealogical DNA Analysis and Search (FGGS) Data, the utilization of FGGS, and criteria for how FGGS may be conducted when using an open-data personal genomics database. SB 187 also describes the type of genomic database that may be used, establishes criteria for the destruction of DNA samples, and establishes penalties for violations, and establishes procedures regarding the use of FGGS by both the courts and laboratories. SB 187 also requires the Department of Public Safety and Correctional Services (DPSCS) to submit an annual report pertaining to FGGS data.

COMMENTS:

- The Department of Public Safety and Correctional Services (DPSCS) primary mission is to oversee the Division of Correction (DOC), which houses inmates sentenced to terms of incarceration exceeding 18 months, the Division of Parole and Probation, and the Baltimore City Pretrial Complex.

- SB 187 requires DPSCS to submit an extensive annual report on FGGS in accordance with Courts Article § 2-513.

    - First, DPSCS does not host any databases that have DNA, therefore, there would be nothing to report with regard to the collection or analysis of FGG pursuant to the required reporting requirement under the bill.

    - Additionally, there is no § 2-513 of the Courts Article.

- DPSCS confirmed with the bill's policy analyst in the Department of Legislative Services that Courts Article § 2-513 referenced in the bill is a drafting error, and the reporting requirement should have referenced **Public Safety Article § 2-513 and the Department of State Police.**

- Public Safety Article § 2-513 states:
    - (a)(1)(i) On or before April 1, 2010 and on or before April 1 annually thereafter, the Department shall report to the Governor and, in

accordance with 2-1257 of the State Government Article, the General Assembly, on the status of the statewide DNA database system as specified in subsection (b) of this section.

- As such, DPSC asks the Committee to consider an amendment to reflect **the correct** reporting requirement as follows:
    - Beginning on line 16, page 11 strike "§ 2–513 of the Courts Article, the Department of Public Safety and Correctional Services" and insert:
    - "§ 2–513 of the Public Safety Article, the Department of State Police"
- **CONCLUSION**: For these reasons, the Department of Public Safety and Correctional Services respectfully requests the Committee consider this information as it deliberates on Senate Bill 187.